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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re HealthTek, Inc.

Serial No. 75/297,144

Alexander C. Johnson, Jr. and Graciela G. Cowger of Marger Johnson & McCollom, P.C. for HealthTek, Inc.

Edward Nelson, Trademark Examining Attorney, Law Office 114 (Conrad Wong, Acting Managing Attorney).

Before Hanak, Bucher and Holtzman, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

HealthTek, Inc., a corporation of the State of Washington, has applied to register the mark "HEALTHTEK" as shown below:

HealthTek

for the following services:

> "Retail store services in the field of pharmaceuticals and home health care supplies and equipment; namely, prescription and over-the-counter medicines, nutritional supplements, hospital-type beds, walkers, wheelchairs, bath benches, grab bars, canes, crutches, orthopedic and sports medicine braces and supports, athletic tape, incontinence and urologic supplies, ostomy supplies, wound care supplies, tapes and dressings, vascular stockings and compression garments, diabetic strips, meters and lancets, and postmastectomy breast forms and bras," in International Class 35

"Rental of wheelchairs," in International Class 39,

and

"Rental of hospital-type beds, walkers, and patient lifts; rental of respiratory equipment and oxygen tanks," in International Class 42.[1]

The Trademark Examining Attorney issued a final refusal to register based upon Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, "HEALTHTEK" as used on these services providing pharmaceuticals and medical equipment, so resembles the registered marks, "HEALTHTECH REHABILITATION, INCORPORATED,"[2] and "HEALTHTECH"[3] as applied to "health care services, namely physical therapy, occupational therapy and speech-language pathology aimed at restoration of mobility, physical, functional and communication ability; and psychosocial services, namely testing and consultation in the field of psycho-sociology aimed at overcoming mental and emotional barriers limiting restoration of mobility, physical, functional and communication ability," in International Class

[1] Serial No. 75/297,144, filed on May 23, 1997. The application for these three classes of services is based upon use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a), with May 1, 1988 alleged as the date of first use of the mark anywhere, and May 1, 1988 alleged as the date of first use of the mark in commerce.

[2] Registration No 1,976,333, issued on May 28, 1996. The registration sets forth dates of first use in 1985.

[3] Registration No 1,989,750, issued on July 30, 1996. The registration sets forth dates of first use in 1985.

42, as to be likely to cause confusion, or to cause mistake, or to deceive.

Our determination under Section 2(d) is based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

As to the marks, applicant argues that while phonetically similar, they are distinguishable given the different spelling of the final suffix (e.g., "-tek" v. "-tech") and the fact that applicant's mark is shown in upper and lower case letters (HealthTek).

The Trademark Examining Attorney counters that these differences are inconsequential -- that the marks look and sound alike and convey the same commercial impression.

We agree with the Examining Attorney that when applicant's "HEALTHTEK" mark is compared with registrant's "HEALTHTECH" mark, as well as with the predominant portion of registrant's "HEALTHTECH REHABILITATION, INCORPORATED" mark, they are essentially phonetic equivalents. There is nothing

in the nature of its services, as recited in the application, which would preclude applicant's promoting its mark aurally as well as visually. Furthermore, the fact remains that in terms of appearance, the marks at issue herein, "HEALTHTEK" and "HEALTHTECH," are substantially identical. Nothwithstanding the minimal stylization incorporated into applicant's mark, we agree with the Trademark Examining Attorney that given the fallibility of the average consumer, these respective marks must be deemed to be quite similar indeed. In view thereof, and inasmuch as applicant's mark, when pronounced, is susceptible to having the same connotation as registrant's mark, it is plain that the marks at issue project essentially the same commercial impression. Contemporaneous use of the marks "HEALTHTEK" and "HEALTHTECH" in connection with related or complementary services would therefore be likely to cause confusion as to the origin or affiliation of such services.

Turning to the services, applicant contends that patients would need to go to different locations to get these respective services, that rehab specialists are very different kinds of service providers than are pharmacists, and that the Trademark Examining Attorney's several potential examples of registrant's services being provided with equipment bought or rented from applicant are mere speculation rather than reflections of the real-world. By contrast, the Trademark

Examining Attorney contends that these services are indeed closely related. While applicant would have us focus on the prominent role of physicians and other health care professionals in choosing the services of registrant and of applicant, the Trademark Examining Attorney would have us look to the patients -- the health-care consumers of both of these services.

We concur with applicant that these services are provided by health care providers in distinct occupational niches having different professional training. However, in reality, applicant's services dealing in the sale or rental of walkers, wheelchairs and crutches are by definition complementary to health care services such as providing physical therapy. While admittedly these are not competing services, such complementary use is most relevant in determining likelihood of confusion. Where the marks are nearly identical, as is the case here, applicant's services need not be so closely related to registrant's services in order for there to be a likelihood of confusion. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984). Furthermore, there is no evidence in the file supporting applicant's claim that applicant and others in its field do not place their service marks anywhere on rented medical equipment, such as wheelchairs.

As to the respective channels of trade, applicant argues without evidence that members of the general public simply do not expect these services to originate with the same source. One could assert the opposite expectation just as persuasively -- that some medical centers do provide on-site pharmacies, and that it would not be unheard of for a facility dedicated to physical therapy to offer a co-located and affiliated unit where its patients can rent a set of crutches, a wheelchair, cane or walker.

Turning to the conditions under which these services are offered and purveyed, we agree with applicant that most health-care patients seeking these services will be careful in making this selection. However, we cannot assume that these ultimate customers are necessarily sophisticated. While some of the pharmaceuticals and equipment provided by applicant will be chosen according to the prescription of a physician, this alone does not guard against confusion on the part of the patient. Furthermore, the listed supplies, drugs and equipment also include over-the-counter items, where such intervention will not be indicated.

As to the number and nature of similar marks in use on similar services, applicant makes the claim that the cited mark is weak in the health care field. However, other than the registrations of a single third-party registrant placed in

the record by the Trademark Examining Attorney, there is also no evidence in the file of the existence of another federal registration in related areas of the health care field.

Finally, applicant asserts that despite more than ten years of simultaneous usage, there is no evidence of any actual confusion. However, there is no affidavit or other evidence in the record to support such a statement. Moreover, applicant has provided no information as to its sales or advertising, such that we could conclude from the lack of instances of actual confusion that confusion is not likely to occur.

Decision: The refusal to register under Section 2(d) of the Act is affirmed.

E. W. Hanak

D. E. Bucher

T. E. Holtzman

Administrative Trademark Judges, Trademark Trial and Appeal Board